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No. 130

# In the Supreme Court of the United States

OCTOBER TERM, 1961

APEX DISTRIBUTING CO., INC., ALBERT A. FINER AND JOSEPH R. SNYDER, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 45–51) is reported at 288 F. 2d 796.

### JURISDICTION

The judgment of the court of appeals was entered on April 5, 1961. On May 4, 1961, Mr. Justice Harlan granted an order extending the time of petitioners to file their petition for a writ of certiorari to and including June 4, 1961. The petition of a writ of certiorari was filed on June 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the petitioners' convictions on count eleven of the indictment.

2. Whether that count charged a conspiracy separate from that charged in count one, as to which the convictions were reversed.

3. Whether the trial court properly refused petitioners' requested instructions as to count eleven.

## STATUTE INVOLVED

18 U.S.C. 371 provides in pertinent part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

## STATEMENT

The only count before this Court is count eleven of the indictment returned in the United States District Court for the Eastern District of New York. That count charged a conspiracy to defraud the United States (a) of a sum of money; (b) of its right to have Navy procurement regulations complied with free from impairment by deceit and dishonesty; and (c) of its right to have contracts performed in accordance with their terms without fraudulent solicitation and acceptance of orders (App. 21–22). The convictions of petitioners on this count were affirmed by

the Court of Appeals for the Second Circuit.[1] The convictions on other counts were reversed because of an error in the charge.

The count was based on the sale by Apex Distributing Company, Inc. of a concentrated beverage flavoring base, called Quix, to the United States Navy, for use in making cold drinks. Apex, which was owned by petitioner Finer (R. 2419), was the sole distributor of Quix (R. 154). Petitioner Snyder was the accountant for Apex and Finer (R. 2478).

The pertinent facts may be summarized as follows:

1. *The Navy Procurement System.*

Contracts for food supplies, which the Navy classifies as either Provisions or Ship's Store Stock, are let by Navy Purchasing Offices throughout the United States (R. 1199–1200, 1216, 1222). From Provisions comes food for the subsistence of Navy personnel, served free of charge in the General Mess (R. 1202–1203). Ship's Store Stock provides food for resale through commissaries and ship's stores ashore and afloat. A ship's store afloat is a retail outlet on a vessel, similar to a drugstore with a soda fountain (R. 1202–1203). Contracts for Provisions items, such as beverage base (R. 1338–1339, 1350), are let by Navy Purchasing Offices on a low bid basis following advertised invitations for bid (R. 1216–1217). These items must conform to military specifications and pass quality tests by Navy laboratories (R. 883, 1217–1218).

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[1] Petitioner Finer received a sentence of eighteen months, petitioner Snyder, a sentence of six months, and petitioner Apex, a nominal fine.

All of the contracts in this case, known as Open-End, Indefinite Quantity Supply Contracts (R. 1219), were for Ship's Store Stock, and were let as a result of negotiation between the Navy and the contractor, or in response to invitations for bid (R. 1221–1223). By their terms, the contractor was bound to deliver his goods at set prices up to an estimated maximum amount as ordered by the Navy (R. 1392–1394). If the Navy ordered more than the estimated maximum and the contractor accepted the orders, the Navy was obligated to pay the contract price (R. 1392–1394). All but one of the contracts (Ex. 2) were for ship's stores afloat and called for delivery within a specified geographic area comprising a Naval District (Exs. 19–27). They ran for a period of three or four months and were called quarterly, or local, contracts (R. 1244). Six of these classified Quix as "K–4 Fountain Supplies" (Exs. 19–23, 26).[2] Government's Exhibit 2, known as a National Contract, called for the delivery of Quix Beverage Base to shore installations within the continental United States, ran for a period of one year, and categorized Quix as "S–1 Groceries."

A ship's supply officer, who was responsible for obtaining both provisions and Ship's Store Stock for his vessel (R. 1292–1293), would procure them by placing orders under existing contracts covering the Naval District in which his ship was located. He would

[2] "K–4" was the Navy Supply category for ice cream flavorings (which could be procured by ship's stores afloat). Beverage base fell under the category of "S–1" (R. 1263–1264; Ex. 2).

learn of the existence of the contracts either from Contract Bulletins furnished him by the Navy (R. 1245–1247) or directly from salesmen who solicited orders aboard ship (R. 1249).

All the contracts required that, after delivery, the contractor certify his bill to be "correct and just," and send it to the ordering Naval activity for forwarding, together with proof of receipt and acceptance, to a designated Navy Regional Accounts Office for payment (R. 1401–1403, 1729). When an invoice was received, the Navy Regional Accounts Office, New York, checked to see that the contract was in existence, that the products listed, the prices, and totals were correct, that there was proof that the product had been delivered and that the "correct and just" certification on the invoice was signed (R. 1705). It did not verify whether the ordering activity (for example, the ship) was authorized to order under the contract (R. 1706). As a practical matter, an apparently valid invoice under contracts such as these, for ordinary day-to-day requirements of the Navy, was not thoroughly reviewed by the Navy Regional Accounts Office (R. 1355–1356, 1706, 1740–1741), and it relied principally on the contractor's integrity in submitting the invoice (R. 1732).

2. *The Fraud Charged.*

In count eleven, the government charged that, in furtherance of the conspiracy to defraud, petitioners sold and delivered Quix to vessels afloat, under the National Contract, knowing that ship's stores afloat were not authorized to procure beverage base; sold and delivered Quix to vessels outside the Third Naval

District[3] under New York quarterly contracts; falsely represented that Quix was a "flavoring concentrate" which could be used as a flavoring for ice cream and sherbets; and, having obtained contracts for Quix, delivered to certain vessels products inferior in price and quality which were billed as Quix.

3. *Evidence Adduced at the Trial.*

a. *Evidence of fraud under the National Contract.*

Although the National Contract was in the name of Quix Flavoring Extract Corporation, the manufacturer of Quix, the real party in interest to it was Apex (R. 50–56, 2395). Petitioner Finer negotiated the contract (R. 2395) and selected the sales representatives (R. 2397) to whom he gave copies of the contract (R. 2402). Apex received copies of the invoices which were prepared in billing the Navy (R. 2185–2186, 2398–2399; Ex. WWW).

Under the National Contract (Ex. 2) at least eighty-eight unauthorized sales, representing approximately $79,000, were made to ships (Ex. WWW). The copies of invoices received by Apex showed this fact. Apex not only accepted payment for, but encouraged, such sales (R. 55–56, 2503–2504), although Finer knew that sales to ships were unauthorized under the contract (R. 1606–1607; Ex. 140).

b. *Evidence of fraud under Third Naval District contracts.*

In 1954, petitioners negotiated three contracts for the sale of Quix to ship's stores afloat within the territorial limits of the Third Naval District (Exs.

[3] The Third Naval District generally encompasses the Port of New York area (R. 1430).

19–21). Petitioners were aware of the geographic limitations from their copies of the contracts (R. 1419). Nevertheless, petitioner Finer accompanied the salesman who made some of the unauthorized sales to ships outside of the Third Naval District (R. 501, 503–504, 507), and was present when an order was solicited, under a Third Naval District contract for ship's stores afloat, from the Philadelphia Navy Yard which was not a ship's store afloat (R. 473–477). Finer stipulated that he was aware that the shipyard was located in the Fourth Naval District (R. 2540).

Petitioners provided their salesmen selling under these contracts with a price sheet (Ex. 58) which listed the items available, the address to which orders should be sent, the effective dates of the contract, and the contract number, but not the activities which were authorized to order under the contract (R. 584, 593–597, 499–500; Exs. 58, 59). Since this information gave no warning to supply officers that they were being asked to order under a local contract (R. 1427), Apex was able to induce ships which were not within the territorial limits described in these contracts to order Quix. At least eleven sales made under these three contracts were unauthorized because deliveries were made outside the Third Naval District (Exs. 39, 42, 44–46, 50, 52–56).

c. *Evidence of false representation as a "flavoring concentrate."*

Petitioners had been informed by the Navy that ship's stores afloat were not authorized to procure

beverage base (R. 361–362, 2243–2244, Ex. 210). The price schedule which they submitted to the Navy Purchasing Office, New York, when negotiating for the first quarterly contract, therefore, described Quix as "flavorings for making ice cream, sherbets and cold confections" (Ex. 62). The Navy Purchasing Office adopted the language which Apex submitted (R. 879, 1343), thinking that it was contracting only for ice cream flavorings (R. 877–878, 906).[4] The commanding officer of the Navy Purchasing Office testified that he would never have allowed beverage base to be included in these contracts since it was not an authorized item for ship's stores afloat (R. 882–883). Petitioners instructed their salesmen to use the term "cold confection" rather than "beverage base" in selling, and said the product could be sold as a ship's store item and then transferred to the general mess account (R. 584, 592, 402). Such a transfer would be in violation of Navy regulations (R. 1236), a fact of which petitioners were also aware (Exs. 193, 194, 195). By avoiding the phrase "beverage base" when dealing with ships (R. 584), Apex was able to sell to ship's stores afloat under the purported authority of these ice cream flavoring contracts and to bill the Navy on behalf of Apex for items which, regardless of their nomenclature, were intended primarily for cold drinks in the general mess (R. 654), and which could not be used for making ice cream (R. 112, 114).

[4] In addition to the specific description, the Apex schedule (Ex. 62) classified Quix as "K–4," the Navy supply category for ice cream flavorings.

d. *Evidence of fraudulent substitution of inferior brands for Quix.*

The manufacturer of Quix made two other brands of beverage base, California and Bellaire (R. 5–6). Both of these were inferior to Quix in price and quality, and both had a much shorter shelf life (R. 36–40, 261–262).

Petitioners stored these brands with the Bekins Van and Storage Company, a public warehouse which also stored Quix (R. 1010–1014, 1016–1017; Exs. 83, 84). When these brands left the manufacturer's plant for delivery to Apex, they were packed in boxes labeled California and Bellaire, respectively (R. 99–100). On March 15, 1953, petitioner Snyder authorized Bekins in writing to relabel cases containing California brand, and enclosed the necessary labels (Exs. 85, 90). He mailed a new supply of Quix labels on June 17, 1953, and instructed Bekins to relabel two new shipments of California brand (Ex. 92). In August, September, and October 1953, another series of letters by Snyder informed Bekins of the arrival of Bellaire brand (Ex. 98), ordered the relabeling of various shipments of this brand (Exs. 99, 105), and requested that the relabeled Bellaire and a new shipment of Quix be released before other stock (Ex. 104).

Although Finer left the details of inventory to Snyder (R. 2588–2589), he checked his stock on his periodic visits to Bekins (R. 1064, 1162). On one of Finer's numerous visits to Bekins (R. 1012, 1129), he made the initial request that Quix labels be placed on California boxes, stating that Quix and California

were the same product (R. 1014–1015, 1118). He made a similar request when the Bellaire cases arrived at Bekins, promised written authorization for the relabeling, and gave instructions that the Bellaire stock record cards kept by Bekins should be closed out to the Quix records (R. 1023, 1061–1062, 1106–1108).

In late 1954 and early 1955, relabeled cases containing Bellaire beverage base were delivered to naval vessels which had ordered Quix under quarterly contracts obtained by Apex from the Navy Purchasing Office, Los Angeles, for "flavoring for making ice cream, sherbets and ices" (R. 1889–1892; 1906–1908; Exs. 23, 26). Physical evidence of this substitution as to two vessels was introduced at the trial (Exs. 189, 192). The net result was that Apex billed the Navy for Quix at $1.95 a pint, on invoices certified to be "correct and just," under a contract for an apparently legitimate product for use in ship's stores afloat, and delivered a product which was not only unauthorized, but was inferior in price and quality.

## ARGUMENT

Petitioners would have this Court, in the exercise of its power of supervision over the administration of criminal justice in federal courts, reverse their convictions on count eleven, on the grounds of insufficiency of proof, improper fragmentation of a conspiracy, and error in the trial court's refusal to charge certain of their requested instructions. None of these issues has merit and none presents a question worthy of review by this Court.

1. As appears from the facts summarized in the Statement, *supra*, the evidence was ample to support the verdict of the jury that petitioners knowingly engaged in a conspiracy to defraud the United States in many ways in the sale of Quix.

Petitioners' argument that the evidence was insufficient is in large part based on the disposition of the substantive counts. Counts two through ten charged substantive offenses of concealment through trick in violation of 18 U.S.C. 1001 in connection with invoices certified as "correct and just" under the National Contract. The essence of the charge was that the invoices were fraudulent in that the defendants knew that the vessels were not authorized to order and that Apex was not authorized to fill orders from these vessels. These counts were dismissed as to petitioner Snyder by the trial court, and as to Finer and Apex the convictions were reversed by the court of appeals for error in the charge. Counts twelve through twenty-nine charged similar violations of 18 U.S.C. 1001 in connection with invoices for sales under the three Third Naval District contracts. As to these counts, there was a dismissal as to Snyder by the trial court, and an acquittal by the jury as to Apex and Finer. Petitioners argue that to give effect to such action on the substantive counts it is necessary to disregard all the evidence relating to these counts in connection with the conspiracy to defraud charged in count eleven, leaving only the evidence of the substitution of inferior brands to support that count.

This argument is specious. As to the counts which were reversed by the court of appeals (counts 2–10),

although it was one of petitioners' contentions that the certifications of the invoices did not constitute an attempt to cover up unauthorized deliveries under 18 U.S.C. 1001, the court of appeals agreed with the government that the certifications might be a means of covering up; it held only that the jury should have been more specifically instructed with respect to the specific nature of the charge (Pet. 49). Thus, neither the trial court nor the court of appeals has held that the evidence on these counts as to petitioners Finer and Apex was insufficient. As to petitioner Snyder, even though the charges against him on these counts were dismissed, this of course does not imply that he was not sufficiently connected with the fraud charged in these counts to be guilty of conspiracy. As to the counts on which petitioners Finer and Apex were acquitted (counts 12–29), the fact that the trial court or the jury found that the particular invoice which formed the basis of a substantive count was not, in itself, fraudulent concealment by trick does not mean that this portion of petitioners' entire operations had to be disregarded in determining whether they had entered into a conspiracy to defraud the United States.

Irrespective of whether the invoices did themselves fall within the purview of Section 1001, the evidence as to the methods of sale was pertinent on the conspiracy charge as part of the whole picture of a deliberate, well-planned scheme to sell Quix by numerous fraudulent methods. Petitioners admit (Pet. 35–36), as they must, that the charge of conspiracy to defraud the United States went beyond the scope of

the substantive counts. The acquittal or reversal on the substantive counts thus does not affect the conviction on the conspiracy count. *United States* v. *Marcone,* 275 F. 2d 205 (C.A. 2).

Moreover, even on petitioners' theory that the conviction must rest on the evidence of substitution of brands, the proof was sufficient to sustain their conviction. While it is true that the government was able to prove only two instances of actual substitution to the satisfaction of the trial court, there is nothing to substantiate petitioners' statement (Pet. 39) that only fourteen out of 17,200 cases were so substituted. On the contrary, the record is replete with evidence that they conspired to substitute many more than these fourteen cases. A thousand and one cases of Bellaire and five hundred and sixty-nine of California were manufactured and sold to Apex (R. 40–41; Exs. 28, 29). Of these the government proved specific instructions by Apex through Finer and Snyder to change the labels on more than five hundred eighty-three cases (Exs. 90, 92, 99, 105). Finer himself testified that he ordered all the cases in Merchants (a Norfolk, Virginia, warehouse used by Apex) and Bekins relabeled (R. 2444). The letters to Bekins, which instructed relabeling, and cautioned the warehouse to make sure the white label was completely covered by the yellow label, speak for themselves (Exs. 90, 99, 105). Regardless of how many substituted cases the government proved were delivered, there was more than sufficient evidence of a conspiracy to defraud by substitution, a question of fact resolved in favor of the government by the jury.

2. Petitioners argue (Pet. 40–41) that one conspiracy was improperly "fragmented" in counts one and eleven, and urge that their pretrial motion to dismiss count eleven on this ground should have been granted. Count one (as to which the convictions were reversed by the court of appeals on the basis of error in the instructions) charged a conspiracy to violate 18 U.S.C. 281, by having Charles H. Gillilan, a retired Rear Admiral of the United States Navy, Supply Corps, receive compensation for services rendered in relation to contracts and other matters before the Department of the Navy by representing Apex, Melrose, and other concerns in the sale of concentrated flavorings to the Navy. On its face, it is separate from and additional to the conspiracy to defraud in the actual making of sales, as charged in count eleven. The two conspiracies extended over different periods of time, and had different parties and different objects. The fact that a few of the overt acts committed in pursuance of the two conspiracies were the same is therefore immaterial. It was not necessary to the success of the conflict-of-interest conspiracy that the government be defrauded in any way, and conversely, the government could have been defrauded without any violation whatsoever of the conflict-of-interest laws by Admiral Gillilan. Petitioners could have been convicted on one and not the other count without any inconsistency in the jury's verdict.

None of the cases cited by petitioners (Pet. 41) is in point. This is not the situation of *Braverman* v. *United States*, 317 U.S. 49, where there was one

general agreement to operate a still which involved the violation of a number of statutes. Here the objectives of the conspiracy were essentially different in character. The courts of appeals cases cited by petitioners are equally inapplicable. Indeed, in *United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894 (C.A. 2), certiorari denied, 340 U.S. 930, the court recognized that two conspiracies could overlap, and affirmed appellants' convictions on both.

3. Petitioners' contentions concerning the trial court's instructions (Pet. 41–42) are clearly without the importance calling for this Court's review. Moreover, the trial court properly rejected petitioners' requested instructions. Since it is the court's province to decide upon the style and form in which it charges the jury (*Henderson* v. *United States,* 218 F. 2d 14, 18 (C.A. 6), certiorari denied, 349 U.S. 920), it need not adopt the exact language of requested instructions, *Sugarman* v. *United States,* 249 U.S. 182, 185; *United States* v. *Kushner,* 135 F. 2d 668, 674 (C.A. 2), certiorari denied, 320 U.S. 212. A court is not required to give instructions which are in any respect erroneous (*Kreiner* v. *United States,* 11 F. 2d 722, 725 (C.A. 2), certiorari denied, 271 U.S. 688) and it need not sift out the correct from the incorrect parts (*Aeby* v. *United States,* 206 F. 2d 296, 299–300 (C.A. 5), certiorari denied, 346 U.S. 885), or give instructions emphasizing a certain phase of the evidence (*Samish* v. *United States,* 223 F. 2d 358, 366 (C.A. 9), certiorari denied, 350 U.S. 848). In the light of these general principles, an analysis of the court's

action on the requests shows that petitioners' contentions are without merit.

Request Numbers 3, 6, 7, 8, and 14 (Pet. 25) on the general nature of conspiracy, insofar as they were correct, were charged in substance (see App. 90, 99–100, 105). Request Numbers 15–19 were requests to charge as a matter of law on defendants' version of the evidence (Pet. 26–29) and were therefore properly refused. Request Number 22 (Pet. 29) was confusing and erroneous on its face. Request Number 28 (Pet. 30–31) was erroneous, emphasized a particular phase of the evidence, and raised an issue not before the jury. As to the requests relating to Snyder alone, Request Number 24 (Pet. 31) was charged in substance (App. 100–101); Request Number 33 was a summary of the evidence, and as to the law, was in effect a negative statement of what the court charged positively (App. 116–117).

Petitioners' principal contention as to the instructions seems to be that the trial court failed to summarize the evidence for the jury. But the court was under no obligation to do so. As the court of appeals said in *United States* v. *Cohen,* 145 F. 2d 82, 92, 93 (C.A. 2), certiorari denied, 323 U.S. 799:

> If the judge had once embarked upon a consideration of the transactions in detail, he would have committed himself to a discussion of them all; otherwise he would surely have laid himself open to the charge of undue emphasis. On the other hand, to undertake such a Herculean task would not have helped the jury, but merely have added to the weight of verbiage that they had already been called upon to bear

> during twelve days of summing up by counsel. Moreover, it would not have been humanly possible to do so without either making serious slips, or of seeming to favor one side or the other * * *. It is strange to hear an accused complaining of such a failure; we may be assured that, if the power had been used, the complaints would have been louder, and almost certainly better grounded.

The jury had the benefit of summations by counsel for the defense collectively for over three hours and by counsel for the government for over two hours. The evidence therefore was thoroughly marshalled for the jury.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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